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In the

SUPREME COURT OF THE UNITED STATES

———TERM

No. 230

R. G. TRIPPETT AND A. H. MEADOWS,
Transferees of Texota Corporation, Dissolved, et al.

vs.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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R. G. Trippett, A. H. Meadows and Texota Corporation pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 1, 1941, affirming the judgment of the United States Board of Tax Appeals.

Opinions Below

The majority opinion of the Circuit Court of Appeals was written by Circuit Judge McCord. Circuit Judge Sibley concurred, and Circuit Judge Hutcheson dissented and wrote a dissenting opinion. The opinion of the Circuit Court of Appeals, together with the dissenting opinion of Judge Hutcheson (R. 311-317) is reported in 118 Fed. (2) 764. The opinion of the Board of Tax Appeals, dated May 28, 1940, (R. 262) was delivered May 31, 1940 (R. 272-273) and is reported in 41 B. T. A. 1254.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 1, 1941 (R. 318). A petition for rehearing was denied by the Circuit Court of Appeals on May 14, 1941, (R. 326). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

This case involves income and excess profits taxes assessed against Texota Corporation, dissolved, and against Trippett and Meadows as its transferees. Trippett and Meadows owned a substantial part of the stock of the Texota Corporation (whose assets consisted of an oil and gas lease and some cash). Litigation was pending between them and other stockholders as to whether or not they were directors of the corporation. They made a con-

tract with the other stockholders to purchase the remaining stock. They intended to dissolve the corporation. They then made a contract as individuals to sell the oil and gas lease then belonging to the corporation, both they and the purchaser contemplating that it would be performed by them as individuals after distribution to them in liquidation. They consummated the purchase of the outstanding stock. A consent of the stockholders to dissolve the corporation was executed, but through oversight was not filed with the Secretary of State until long after, when the oversight was discovered. The corporation conveyed the lease to Meadows (for himself and Trippett) as a part of the plan of liquidation, and the remainder of the corporate assets were likewise distributed to them. The corporation did no further business of any kind. Trippett and Meadows assigned the lease to the purchaser pursuant to their contract. They treated the sale as having been made by themselves as individuals, and so reported in their income tax returns for the period involved.

The question presented is whether under these facts the sale of the oil and gas lease so made by Trippett and Meadows must be treated as having been made by Texota Corporation, and the income therefrom as the income of the corporation. This presents the following subordinate questions:

(1) Whether the fact that the formal dissolution of the corporation was not filed with the Secretary of State until later prevented the transfer from the corporation

to its stockholders from being a distribution in liquidation.

(2) Whether the contract of sale made by Trippett and Meadows as individuals was as a matter of law the contract of Texota Corporation (although not so intended by them or the purchaser) because the lease at that time belonged to Texota Corporation.

Statutes and Regulations Involved

The pertinent provisions of the statutes and regulations involved are printed in the appendix, infra, pp. 20-26.

Statement

The facts are not in dispute; most of the facts were stipulated. The charter of Texota Corporation, a Texas corporation, provided for two classes of stock known as "A" and "B". The Class B stockholders had the right to elect two of the three directors, and the property of the corporation could not be sold without the consent of the holders of the Class "A" stock (R. 49). On April 5, 1934, Trippett and Meadows jointly acquired by purchase 188-⅔ shares (slightly more than a majority) of the Class "B" stock (R. 51).

Prior to that time there had been for several months dissension among the stockholders (R. 52). On March 5, 1934, the holders of a majority of the total stock attempted to amend the charter so as to eliminate the charter's provision giving Class B stockholders the right to elect a majority of the directors (R. 52), and the holders of

the Class A stock together with less than a majority of the Class B stockholders, treating the purported amendment as being effective, proceeded to elect a Board of Directors consisting of G. E. Grininger, H. A. Garver and R. Congdon, who elected themselves as officers of the corporation.

Meadows, Trippett and others owning more than a majority of the Class B stock, treating the charter as invalid, elected Trippett and Meadows as the Board of Directors (R. 53) and Trippett and Meadows elected themselves President and Secretary-treasurer (R. 53).

The conflict and dissension resulted in litigation which was pending and undisposed of until the matters in controversy were settled by the purchase by Trippett and Meadows of all the outstanding corporate stock (R. 54, 55 and 61).

On or about December 10, 1934, D. W. Josey, of the Rancho Oil Company, Fort Worth, Texas, advised S. A. Cochran, an independent broker of Tyler, Texas, that he would be interested in purchasing said oil and gas lease if it could be bought for $175,000.00, with four wells completed on it (R. 57). Cochran's communication with Josey was after he had received a letter from R. G. Trippett, in which Trippett stated that he and Meadows owned a one-fourth interest in said lease, and could possibly acquire all of the interest and might consider selling it along with some other properties (R. 295). Cochran was advised that the tentative offer above mentioned was not ac-

ceptable, and so reported to Josey on or about December 15, 1934. No other offer was made at that time (R. 57).

On December 17, 1934, Trippett and Meadows telegraphed the "opposition stockholders" (being the holders of the Class A stock and some of the holders of Class B stock) an offer to purchase their stock (R. 58, 206). The representative of said stockholders replied with a counter proposition, which was received by Trippett and Meadows December 19, 1934 (R. 58, 207, 208), and accepted by them by telegram of the same date, said acceptance instructing said stockholders to send their stock to Peoples National Bank at Tyler, Texas, with draft attached, settlement to be made in any event not later than December 31, 1934 (R. 58, 208, 209). The only other outstanding stock, owned by others than Trippett and Meadows, consisted of eighteen shares of Class B stock owned by one Wilson. This stock Trippett and Meadows also arranged to purchase. (R. 59).

On December 18, 1934, Josey called Cochran, the broker, and indicated to him that Rancho Oil Company might be willing to pay $180,000.00 for the lease, with a fourth completed well on it. This conversation was reported to Trippett and Meadows by Cochran at Shreveport, Louisiana, on December 19, 1934; and at the same time he stated to them that he (Cochran) would drill a fourth well on said lease for $10,000.00. Thereupon, Trippett and Meadows stated to Cochran that they would be glad to meet with Josey and discuss the matter further and try to arrive at a deal; whereupon, Cochran called Josey

by telephone and requested him to meet with Trippett and Meadows at Tyler, Texas, on the following day, December 20th (R. 58, 59).

The meeting at Tyler on December 20 was for the purpose of working out a trade, if the parties could agree. Up to that time there had been no offer and acceptance or trade agreed on (R. 264-265, 295). At that time (on December 20) and prior to the time the contract was agreed on, Meadows or Trippett stated that they intended to liquidate the corporation, and the deal in which the property was sold was expressly made between themselves individually and the Rancho Oil Company (R. 264-265, 295).

Trippett and Meadows, on December 20, 1934, met with Josey and agreed upon the terms of a sale of said oil and gas lease to Rancho Oil Company. Said agreement was reduced to writing in the form of a formal contract made by R. G. Trippett and A. H. Meadows as sellers and Rancho Oil Company as purchaser, whereby Trippett and Meadows agreed to sell the oil and gas lease to Rancho Oil Company, and Rancho Oil Company agreed to purchase it from them for $165,000.00 (being $180,000.00 less $5,000.00 commission to Mr. Cochran, which the purchaser assumed, and $10,000.00, the cost of drilling a fourth well). (R. 59 and 209).

Pursuant to the telegraphic order and acceptance hereinabove mentioned, the certificates representing the outstanding stock (not already owned by Trippett and Meadows) were forwarded to the Peoples National Bank at

Tyler, Texas, and paid for through said bank on December 31, 1934, Trippett and Meadows individually borrowing the money from said bank to purchase the stock (R. 59); whereupon, on December 31, 1934, all of the certificates of stock were cancelled, and two new certificates, one for all of the Class A stock and one for all of the Class B stock were issued in the name of A. H. Meadows (for himself and R. G. Trippett, (R. 286, 304); which certificates were pledged with the Peoples National Bank of Tyler to secure the Trippett and Meadows loan (R. 59, 60).

Neither Meadows nor Trippett represented themselves to be acting for Texota Corporation in any of the negotiations and each of them at all times represented himself to be acting in his individual capacity, and they signed the contract with Rancho Oil Company individually because they fully intended to liquidate the corporation at an early date thereafter and thereby become the owners of the lease in their own individual right upon receiving it in liquidation. (R. 267, 285, 286 and 304).

After Meadows and Trippett had agreed to buy the stock and had it sent to them on draft, they had their lawyers prepare a paper for liquidation of the corporation, which was executed by Meadows on December 27, 1934, but in some manner the instrument got in the files of the Rancho Oil Company instead of the files of the Secretary of State of Texas in Austin, Texas. This instrument was a consent of stockholders to dissolve the corporation, signed by A. H. Meadows as sole stockholder and

certified by the president and secretary of the Texota Corporation. (R. 265, 266).

On January 5, 1935, Texota Corporation executed a conveyance of said oil and gas lease to A. H. Meadows (R. 60 and 220). The supporting resolution of the stockholders and directors of the corporation authorizing this conveyance did not use the words "liquidation" but authorized Meadows as president to execute a conveyance to himself "upon such terms and for such consideration as to the president may seem fitting and proper" (R. 224 and 228). Meadows testified that there was no money consideration paid to the corporation for this conveyance and that the conveyance was made to him in liquidation of the corporation. (R. 286, 287). There was no contrary evidence.

On the same day, January 5, 1935, A. H. Meadows and R. G. Trippett executed an assignment of the oil and gas lease to Rancho Oil Company (R. 60, 215).

The conveyance from Texota Corporation to A. H. Meadows was delivered on the date of its execution (January 5, 1935). The conveyance from Meadows and Trippett to Rancho Oil Company was attached to a draft drawn by A. H. Meadows and R. G. Trippett on Rancho Oil Company for $165,000.00, which was placed in the Peoples National Bank at Tyler, Texas, for collection, forwarded by it to its correspondent Bank at Fort Worth, Texas, and paid at Fort Worth by Rancho Oil Company on January 6, 1935, on which date the conveyance to Rancho Oil Company was delivered to it; and

the amount paid by Rancho Oil Company was remitted to Peoples National Bank of Tyler (R. 60, 61).

The notes made by Messrs. Trippett and Meadows to the Peoples National Bank, representing the money borrowed to purchase the outstanding stock, and which notes, among other security, were secured by the two stock certificates in the name of A. H. Meadows, representing the total capital stock of Texota Corporation, were dated December 31, 1934, and were paid on January 6, 1935 (R. 289, 290).

After said payment the Peoples National Bank of Tyler, Texas, had, and made, no further claim on the collateral (R. 290). The certificates themselves were mislaid by the bank and could not be located until a new search shortly prior to the hearing disclosed them in an old "dead" file (R. 290).

The $165,000.00 proceeds of the draft drawn on Rancho Oil Company when remitted to the Peoples National Bank at Tyler, were deposited to the credit of Trippett and Meadows jointly on January 7, 1935 (R. 291).

The Vice-President of the Peoples National Bank testified that the liquidation of the corporation was discussed with Trippett and Meadows when they applied for the loan to purchase the outstanding stock, and that they represented that they would liquidate the corporation, and it was the understanding that the Texota Corporation was to be dissolved whether or not the sale to Rancho Oil Company went through (R. 291, 292) and the attorney for the bank who handled the transaction

likewise testified that it was the understanding the stock had been bought and would come in and the company was to be liquidated (R. 301). He also testified that the instrument evidencing the stockholders' consent to the dissolution of the corporation got mixed up with the papers which were sent to Rancho Oil Company at the time of the forwarding of the draft and assignment from Trippett and Meadows to Rancho Oil Company (R. 303-304).

The testimony of an officer of the bank, the books of the Tyler bank (R. 292, 289, 300) and the Texota Corporation books (R. 297, 300) and Mr. Meadows' testimony (R. 286-287), showed without dispute that at about the same time of the assignment of the oil and gas lease from the corporation to Meadows all of the other assets of the corporation consisting of cash in the bank were distributed to A. H. Meadows as sole stockholder and the corporation never did any business or owned any property thereafter.

Texota Corporation was eventually, on August 14, 1936, formally dissolved by filing consent to dissolution with the Secretary of State, whereupon the Secretary of State issued his certificate of dissolution (R. 62).

In filing their individual income tax returns Trippett and Meadows individually each reported as part of their respective individual incomes one-half of the profit realized by themselves as individuals upon the sale of said oil and gas lease (R. 62).

Specifications of Error to be Urged

The Circuit Court of Appeals erred:

1. In holding the oil and gas lease was not distributed to Trippett and Meadows in liquidation of Texota Corporation.

2. In holding that the written contract between Trippett and Meadows as individuals and Rancho Oil Company was the contract of Texota Corporation.

3. In holding that the sale made by Trippett and Meadows to Rancho Oil Company was in legal effect a sale by Texota Corporation and therefore that the income from such sale was income of Texota Corporation.

4. In affirming the judgment of the Board of Tax Appeals.

Reasons for Granting the Writ

I.

The Circuit Court of Appeals held that the conveyance of the oil and gas lease from Texota Corporation to Meadows was not a distribution in liquidation of the corporation and this holding is based on the facts that the stockholders' consent to dissolution, through oversight, had not been filed at that time with the Secretary of State and that the resolution of the stockholders authorizing the transfer did not specifically state the transfer was to be made in liquidation of the corporation. The undisputed facts show that Trippett and Meadows (who undeniably had the right to do so) intended to liquidate

the corporation; that the stockholders' consent to dissolution was executed and that the failure to file it immediately was an oversight; that all the other assets of the corporation were distributed to Trippett and Meadows at about the same time, and that the corporation never did any further business of any kind. The Circuit Court nevertheless held that the transfer was not a distribution in liquidation because to hold that it was "would be to hold such distribution accomplished by intendment." This decision is in conflict with other decisions of Circuit Courts of Appeals in the cases of *Holmby Corporation v. Commissioner of Internal Revenue, 83 Fed. (2) 548, (C. C. A. 9th); Gossett v. Commissioner of Internal Revenue, 59 Fed. (2) 365, 60 Fed. (2) 484. (C. C. A. 4); Novo Trading Company v. Commissioner of Internal Revenue, 113 Fed. (2) 320, (C. C. A. 2); Kennemer, et al., v. Commissioner of Internal Revenue, 96 Fed.(2)177(C.C.A.5); Tate v. Commissioner of Internal Revenue, 97 Fed. (2) 658 (C. C. A. 8); Ward M. Canady, Inc. v. Commissioner of Internal Revenue, 76 Fed. (2) 278 (C. C. A. 3); Commissioner of Internal Revenue v. Straub, 76 Fed. (2) 388 (C. C. A. 3).* All of these cases have applied the rule stated by the Circuit Court for the Ninth Circuit in *Holmby Corporation v. Commissioner of Internal Revenue,* supra, as follows:

> "The determining element is whether the distributions were in the ordinary course of business and with intent to maintain the corporation as a going concern, or after deciding to quit and with intent to liquidate the business."

For example, in *Tate v. Commissioner of Internal Revenue*, supra, the Circuit Court for the Eighth Circuit said:

> "Whether a dividend is a 'distribution in liquidation' is a question of fact, and depends upon the intent of the directors of the corporation."

Even the Circuit Court for the Fifth Circuit has applied this rule in *Kennemer, et al v. Commissioner of Internal Revenue, 96 Fed. (2) 177*, wherein Circuit Judge Holmes said:

> "It is not material that the distribution was not specifically designated as a liquidating dividend or that no formal resolution to liquidate or dissolve the corporation had been adopted when the distribution was made . . . The determining element was the intention to liquidate the business, coupled with the actual distribution of the cash to the stockholders . . . We must give effect to what was intended and done."

In *Novo Trading Company v. Commissioner of Internal Revenue*, supra, the three stockholders of a New York corporation agreed to dissolve the corporation and liquidate its affairs. One of the assets of the corporation was a claim against the United States for refund for illegally collected import duties which the corporation had paid under protest. The stockholders agreed that this claim should be divided equally between the stockholders. A certificate of dissolution was executed by the stockholders and delivered to their attorney but never filed with the Secretary of State. However, the corporation did no further business and remained dormant. The claim mentioned was allowed by the United States and the proceeds

of the check by the Treasury Department drawn to the order of the corporation in payment of the claim were divided between the stockholders equally. The Commissioner of Internal Revenue in that case contended the proceeds of this check were income of the corporation. This contention was mainly based on the fact that the corporation had not been formally dissolved. The Circuit Court of Appeals for the Second Circuit gave effect to the intention of the stockholders to effect a distribution and held the proceeds of the claim mentioned were income of the stockholders and not of the corporation.

The decision of the Circuit Court of Appeals in the respect above mentioned is also in conflict with the established law in Texas evidenced by the decisions of the Texas Courts of Civil Appeals in the case of *Austin v. Wortham, 298 S. W. 620,* and *Olsen v. Homestead Land and Improvement Co., 28 S. W. 944.* In the former case, the Texas Court said:

> "But there is evidence tending to prove a transfer and distribution of the corporate property among the stockholders before the baking company was formally dissolved. That this may be done, where the rights of creditors are not affected, cannot be denied."

In the *Olsen* case, the Texas Court said:

> "When, as in this case, the corporation and its stockholders have agreed that a portion of the assets of the concern may be divided among the shareholders, and a division has been ordered, the corporation has no further interest in the money or property so directed to be divided, and no duty

in connection with it, except in case of money to pay, and in case of property to transfer to the stockholders their respective shares in the dividend."

II.

The Circuit Court of Appeals in the instant case also held that the written contract made by Trippett and Meadows for the sale of the oil and gas lease was the contract of Texota Corporation, in spite of the undisputed fact that there was no intention to contract with, for or on behalf of the corporation. As stated by Circuit Judge Hutcheson in his dissenting opinion "the facts . . . show unequivocally that all negotiations between buyer and seller were had with the understanding that it was a personal sale of Trippett and Meadows; that the contract of sale was drawn between Trippett and Meadows individually as sellers and Rancho Oil Company as buyer; and that it was arrived at after sellers had stated that the deal was being made by them individually, and that they intended to liquidate the corporation and then consummate the sale."

As further stated by Judge Hutcheson in his dissenting opinion the decision of the Circuit Court of Appeals is "based upon the incorrect legal theory that though Trippett and Meadows were trying to contract for themselves they could not do so since at the time the contract was made the corporation owned the property, the subject of the contract, and they did not."

The decision of the majority of the Circuit Court of Appeals in this respect is in conflict with the established law in Texas as evidenced by the decisions of the Texas Courts in *Hufstutler v. Grayburg Oil Co., 48 S. W. (2) 591; Tison v. Smith, 8 Tex. 147; American National Bank of Wichita Falls v. Haggerton, 250 S. W. 279.*

In *Hufstutler v. Grayburg Oil Co.*, the Texas Commission of Appeals in an opinion approved by the Texas Supreme Court said:

> "There is no rule of law, of which we are aware, which renders it illegal for a person to promise to convey land which he does not own. His promise to do so, if the promise is founded on a legally sufficient consideration, constitutes a valid legal obligation. His failure to perform his promise renders him responsible for compensatory damages. The fact that specific performance of his promise cannot be enforced in equity does not affect the legal obligations of the parties."

Moreover, the decision of the Circuit Court of Appeals that the contract, expressly made by and with Trippett and Meadows as individuals, was a contract of the corporation though there was no intent to make it such is in conflict with the Texas law evidenced by opinion of the Texas Court of Civil Appeals in *Standard Underground Cable Co., v. Southern Independent Telephone Co., 134 S. W. 429*, in which the court said:

> "It would not matter what authority Mrs. Brett had from the corporation. She was not represent-

> ing the corporation in signing the letter, and appellant knew it."

The Circuit Court's opinion in this respect is also in conflict with an opinion of the Circuit Court of Appeals of the Eighth Circuit in *American Preservers' Co. v. Norris, 43 Fed. 711,* in which the court said:

> "The agreement in question professes on its face to be the individual contract of L. E. Taylor, E. R. and James N. Norris, with the trustees of the American Preservers' Trust; and it cannot be construed as the contract of the Taylor Manufacturing Company without the aid of extrinsic proof, which has not been furnished, even if such proof is admissible."

III

This case involves an important question of Federal law which has not been but should be decided by this Court. Hundreds of small corporations are liquidated and dissolved every year. It is important to know whether the income from sales by stockholders of property distributed to them in liquidation of a corporation is to be taxed as income of the corporation or income of the stockholders, and it is important to know whether stockholders are to be denied the right to contract as individuals with reference to assets of a corporation which they expect to receive in liquidation of the corporation.

Conclusion

WHEREFORE, it is respectfully submitted that this petition should be granted.

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